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No. 10-58

Supreme Court, U.S.
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In The

Supreme Court of the United States

MARK EDW. ANDREWS,

Petitioner,

v.

D. DOUGLAS HOWARD, JR.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Can petitioner avoid fee shifting on remand under 28 U.S.C. § 1447(c), by declaring that an issue which the U.S. Supreme Court has addressed constitutes the "absence of clearly established law, demonstrating a lack of reasonable basis or clearly established law"?

2. Can petitioner claim that a lodestar analysis of fee shifting has been bypassed when both the district court and appellate court were briefed on the issue, and the lodestar analysis was applied?

3. Can petitioner re-litigate the validity of the Order of Remand through continual appeals and a request for rehearing on the issue of the attorney's fees and costs awarded against him by the Fifth Circuit Court of Appeals?

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STATEMENT OF THE CASE

BACKGROUND

This case first began in First City Court for the City of New Orleans. Respondent, D. Douglas Howard, Jr. ("Howard") had filed a suit on an open account against a former divorce client defendant, Leslie Simmons St. Germain ("St. Germain"), seeking recovery for payment of unpaid fees. Howard won and collected the fees due. Petitioner, Mark Andrews ("Andrews"), then sued respondent Howard on behalf of St. Germain in the Civil District Court for the Parish of Orleans, alleging, *inter alia,* that Howard had committed legal malpractice and breach of contract. Petitioner requested that Howard join in a voluntary Motion to Dismiss the legal malpractice claims without prejudice which respondent Howard did, believing that the matter had been put to rest.

Respondent Howard was wrong. Petitioner then filed on behalf of his client, St. Germain, and two former clients of respondent, a RICO action in the Federal Eastern District of Louisiana, alleging that respondent had committed various RICO violations, including mail fraud and wire fraud. Additionally, petitioner, on behalf of his clients, reurged all the claims that St. Germain had voluntarily dismissed in the State Civil District Court. Finding that the defendants RICO allegations were meritless, the Federal Eastern District Court dismissed the case. Respondent appealed the dismissal to the United Court of Appeals for the Fifth Circuit, but it affirmed

the dismissal and judgment was entered accordingly. Petitioner filed writs to this Court, which were denied.

Respondent Howard filed a Petition for Defamation in state district court partly on grounds of lodging of the above RICO action which falsely alleged that he had committed wire and mail fraud. Petitioner, on behalf of his clients, removed the defamation action to the Eastern District of Louisiana even though he had no valid grounds to remove the state claims. However, the Eastern District Court remanded the matter and awarded attorney's fees for a frivolous removal. Petitioner appealed the award of attorney's fees to the Fifth Circuit Court of Appeals, which affirmed the award, and awarded double costs and attorney's fees for the frivolous appeal of the attorney's fees award. Petitioner sought an *en banc* rehearing, which was denied. Petitioner now seeks review of the award of attorney's fees and costs with this Court.

I. RELEVANT FACTS

Petitioner represented former clients of Howard, an attorney known within the local community as a premiere divorce attorney who aggressively protects the interest of those clients. Howard represented Hillary Hillyer ("Hillyer")[1] in 2005-2006, Leslie St.

[1] Both Hillyer and Luminais have withdrawn from all actions against Howard.

Germain ("St. Germain") in 2006 and Melissa Luminais ("Luminais") in 2007.

II. PROCEDURAL HISTORY

Petitioners had alleged that Howard is a racketeer who engaged in mail fraud and wire fraud because he required a retainer, charged an administrative fee, and withdrew his representation from two of the petitioners as per the terms of their contracts. The fees paid by each of the petitioners to Howard were $6,500, $7,653 and $12,657.

Frustrated by the non-stop litigation being instigated by Andrews, who had posted his Supreme Court brief – the brief that called Howard a racketeer – on his website, respondent Howard sued the defendants in state court for defamation based upon the contents of the federal pleadings. Petitioner Andrews responded by filing a reconventional demand alleging malpractice and breach of contract – the state law claims that had been dismissed by the Eastern District Court without prejudice almost a year before. Based upon the allegations in the reconventional demand, Howard amended his Petition to add claims of abuse of process and malicious prosecution.

Petitioner removed the state court proceedings to the Eastern District of Louisiana where Howard filed a Motion to Remand.

At that hearing, Andrews was unable to state any legitimate grounds for the removal. The district

court chastised him for the baseless removal, remanded it to state court, and assessed attorney's fees against Andrews. Andrews opposed the imposition of fees arguing that he could not afford them. The court then issued an order that all defendants are liable for the attorney's fees.

The Fifth Circuit affirmed the award of costs and attorney's fees by the district court, and additionally sanctioned Andrews with the fees and double costs Howard incurred in opposing the appeal. The Fifth Circuit rejected petitioner's contention that the removal was supported by reasonable grounds based on his argument that because he is an officer of the Court and/or that his case raises a constitutional question. The Fifth Circuit relied on this Court's holding in *Cammer v. United States*, 350 U.S. 399, 405-08 (1956), which determined that an attorney is not an officer of the Court within the ordinary meaning of that term, as well as *Ex Parte Garland*, 71 U.S. 333, 378 (1866). The Fifth Circuit also relied on *Willingham v. Morgan*, 395 U.S. 402, 406-08 (1969), which interprets 28 U.S.C. § 1442 as applying to only those cases where a federal officer required a federal forum, and was never intended to be used by a private attorney to remove a state action to federal court. Petitioner filed a request for *en banc* hearing, which was denied.

Petitioner seeks this writ of certiorari to overturn the Fifth Circuit's award of attorney's fees and double costs as a result of the frivolous appeal. However, in seeking the overturn of the award, he attacks the

rationale of the district court's decision to remand and the Fifth Circuit's affirmation of that remand.[2]

REASONS FOR DENYING THE PETITION

- Controlling case law existed at the time of the removal, which established that a private attorney could not remove a case under 28 U.S.C. § 1442;
- There is no constitutional question raised by the petitioner's prior state claims, nor did prior RICO legislation raise a federal question;
- The district court did not abuse its discretion in taxing of costs and awarding attorney's fees when no objectively reasonable basis for removal existed. The Fifth Circuit Court of Appeals correctly sanctioned Andrews for a frivolous appeal of the district court's award;
- The lodestar standard was applied in awarding attorney's fees; and
- Petitioner's continued appeals are an attempt to circumvent the purpose of 28 U.S.C. § 1442.

[2] Petitioner has not sought certiorari on behalf of his clients, but only on his own behalf. If this Court were to grant the writ, petitioner's clients would still be responsible for the costs and attorney's fees since they are not parties to the writ.

1. Existing case law established that removal was not possible as an officer of the court or through the need for a federal defender.

To qualify for removal under 28 U.S.C. § 1442(a)(3), the defendant must show both that the suit is based on actions taken under the color of office **and** that the officer of the federal court has a colorable federal defense. *Jefferson County, Ala. v. Acker*, 527 U.S. 423, 199 S.Ct. 2069 (1999). The district court, having found that Andrews was not an officer of the court for purposes of removal, could have stopped its inquiry there.

Instead, the federal district court asked Andrews to identify defendants' purported colorable federal defenses, which could include official immunity, sovereign immunity, governmental tax immunity doctrine, the government contractor defense, acting within the course and scope of federal duties, and/or that state law claims could impede enforcement of a federal law. Andrews asserted the "federal contractors defense," *i.e.*, that he was under federal direction when he filed his original brief. This new approach prompted the following dialogue between Andrews and the federal district court:

> The Court: So I was directing you to do what you did in this Court, to file what you filed? Are you saying I was the federal officer who was directing you to do what you did?

Mr. Andrews: You didn't direct me to file the case, Your Honor.

The Court: Well, name the federal officer who was directing you.

Mr. Andrews: The entire court was.

This interchange underscores the absurdity of the argument and supports the district court's award of attorney's fees as well as the sanctions awarded by the Fifth Circuit. (Transcript, pg. 16, App. 16).

2. Petitioner's clients stated no federal question.

Petitioner also averred that the petition was removable under 28 U.S.C. § 1441(b), which allows a defendant to remove a claim over which the federal court has original jurisdiction arising under the Constitution, treaties or laws of the United States. The test for original jurisdiction is whether the federal court would have had jurisdiction over the claims filed in the Petition being removed if it had been filed in federal court. The Petition and the Amending Petition asserted state law claims of defamation, abuse of process, malicious persecution, and intentional and negligent infliction of emotional distress. Petitioner's two former and present clients asserted state law claims of malpractice and breach of contract, in their reconventional demand. None of these claims raise a federal question.

Nonetheless, petitioner argued that a federal question was created because respondent Howard's Exception of Prescription, filed in state court, argued that defendants' reconventional claims were time barred, where those claims had originally been dismissed without prejudice by the federal district court. Again, petitioner was unable to cite any statutory or jurisprudential law to support his argument.

Petitioner unsuccessfully argued that there was "at least an informal recognition that the new removed action had some kind of relation to the former federal case, and that petitioner was not unreasonable in thinking that such a relationship existed" because the district court mentioned the prior RICO suit. Petitioner failed to mention that the discussion was in the context of the district court chastising him for filing a motion to remove that was as baseless as the RICO case which had been dismissed:

> And it's already been decided, in this Court and the Fifth Circuit, that the underlying RICO case was legally untenable.

(Transcript, pg. 22, App. 22).

The federal district court's observation that both the suit and motion were baseless hardly creates a federal question or any other grounds for removal. The federal district court held that "there are no federal causes of action or claims pled in the state court lawsuit to make it removable under the federal question jurisdiction."

Clearly the district court wanted to send a message to Andrews when it awarded attorney's fees and costs. In the hearing, the district court noted:

> It is true that both this Court and the Fifth Circuit denied the defendant's, Mr. Howard, in that case, the defendant's motion for sanctions. I don't recall exactly what was said about that at the time, frankly, but I think I made a ruling for the bench, as I recall. But I'm not a big fan of sanctioning lawyers, and I'm assuming I just gave Mr. Andrews the benefit of the doubt by not sanctioning him; although it was certainly plausible that he could have been sanctioned, I think, for filing the RICO suit, which was totally baseless, as far as I am concerned.
>
> The Fifth Circuit, as I recall, also, in denying the sanctions, made the comment that it was a very close call, which means they could have gone either way.
>
> Mr. Andrews, before you file anymore, you now, you filed a RICO claim in this Court, that was totally baseless; now you've filed a removal, which was totally baseless. I am imposing fees and costs this time. This has got to stop. And I strongly suggest you do a lot more research before you start filing things in federal court again.

(Transcript pg. 25, App. 25). Thus, under the facts and in light of defendants' failure to legally support the removal, the award was appropriate.

The Fifth Circuit Court of Appeals affirmed the District Court as follows:

> We recently considered a similar request by Appellee in litigation involving these parties in *St. Germain v. Howard*, 556 F.3d 261, 264 (5th Cir. 2009) ("*Howard I*"). In *Howard I*, we dismissed the Appellant's appeal concerning their RICO suit brought against Appellee and two law firms with which he is affiliated without imposing sanctions. *See id.* at 264. However, we noted that it was a "close case" on our decision to deny sanction because the Appellants did not clearly present a cognizable civil RICO claim. *Id.* Here, we impose sanctions of double costs and attorney's fees against Appellant. Supreme Court cases exclude a private attorney from the meaning of "officer of the court," and the district court found Appellant's "officer of the court" argument to be a ridiculous, "farfetched notion." Appellants were on notice that the overruling of objections to remand was an obvious result when they were unable to support their argument at the district court. This appeal is frivolous for purposes of Rule 38.
>
> For the foregoing reasons, we AFFIRM the judgment of the district court and GRANT the motion for sanctions and double costs and attorney's fees.

The Fifth Circuit's opinion confirmed that a constitutional question was not raised by petitioner's

state claims and that petitioner's prior RICO legislation did not raise a federal question. Petitioner's burden of the additional $5,867.00 imposed by the Fifth Circuit pales when compared to the defense costs of over $130,000 that petitioner imposed upon respondent with his never-ending baseless pleadings filed in city court, civil district court, state appellate court, federal district court, federal appellate court, the U.S. Supreme Court, and the state disciplinary counsel. The writ of certiorari applied for should be denied so that the sanctions awarded by the Fifth Circuit Court of Appeals are upheld.

3. Award of fees supported – petitioner's contentions that the lodestar analyses for fee shifting was bypassed is patently untrue.

Petitioner poses the question, "May lodestar analysis of fees shifting be bypassed?" it was not. Federal law allows that "[a]n order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." 28 U.S.C. § 1447(c). In the Fifth Circuit, the "lodestar" method is used to calculate reasonable attorney's fees. *Matter of Fender,* 12 F.3d 480, 487 (5th Cir. 1994), *cert. denied sub nom.*, 511 U.S. 1143, 114 S.Ct. 2165, 128 L. Ed. 2d 888 (1994). Under the "lodestar" analysis, the determination of reasonable attorney's fees involves a two-step procedure. *Louisiana Power & Light Company v. Kellstrom,* 50 F.3d 319, 324 (5th Cir. 1995), *cert. denied*

sub nom., 516 U.S. 862, 116 S.Ct. 173 (1995), citing *Hensley v. Eckerthart,* 461 U.S. 424, 433, 103 S.Ct. 1933, 1939 (1983). Initially, the district court must determine the reasonable number of hours expended on the litigation and the reasonable hourly rates for the participating lawyers. *Id.* Then, the district court must multiply the reasonable hours by the reasonable hourly rates. *Id.* The product of this multiplication is the lodestar, which the district court then either accepts or adjusts upward or downward, depending on the circumstances of the case, assessing the dozen factors set forth in *Johnson v. Georgia Highway Exp., Inc.*, 488 F.2d 1122 (5th Cir. 1969).

In *Johnson*, the Fifth Circuit identified twelve factors to be considered in determining an award of reasonable fees, which are applied "whenever the award of reasonable attorney's fees is authorized by statute." Here, the district court applied these factors when awarding the attorney's fees. Petitioner did not even object to the hourly rate awarded Ms. Rinardo, but nitpicked at such things as whether 3.8 hours for researching petitioner's arguments was too much.

The district court's order makes it clear that the lodestar method was applied when it awarded $7,088.00. The Fifth Circuit affirmed that award and sanctioned Andrews and his clients for a frivolous appeal. (App. 28).

When Howard filed a Motion and Memorandum for Attorney's Fees in the Fifth Circuit, the court applied the lodestar method with detailed discussions of the number of hours expended on the litigation

and the reasonable hours for the participating attorneys, as well as the twelve factors enumerated in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-718 (5th Cir. 1974). Andrews claim that the lodestar was bypassed has no merit and is factually incorrect.

4. Petitioner is attempting an end around appeal of the district court's remand order.

Although Petitioner has not styled this action as an appeal of the district court's remand order and the Fifth Circuit's affirmation thereof and sanctions, it is respectfully suggested that he is, nonetheless, attempting to put the appropriateness of the remand order at issue before this Honorable Court. While the United States Court of Appeals for the Fifth Circuit correctly noted in its opinion of March 5, 2010, that appellants had not sought review of the remand decision, it appears that Petitioner is now contesting the district court's remand order through this writ of certiorari.

The remand order is non-appealable under 28 U.S.C. § 1447, which provides, in pertinent part that:

> **(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443**

> **of this title shall be reviewable by appeal or otherwise.**

The bar against appeal of a remand order applies to remand orders made on grounds authorized in 28 U.S.C. § 1447(c), *i.e.*, lack of subject matter jurisdiction and a defect in the removal process. *Powerex Corp. v. Reliant Energy Services, Inc.*, ___ U.S. ___, 127 S.Ct. 2411, 2415, 168 L. Ed. 2d 112 (2007).

Referring to the 28 U.S.C. § 1447(d) bar to the review of remand orders, this Court has noted that: "the policy of Congress opposes 'interruption of the litigation of the merits of a removed cause by prolonged litigation of questions of jurisdiction of the district court to which the cause is removed.'"

Kircher v. Putnam Funds Trust, 547 U.S. 633, 126 S.Ct. 2145, 2152, 165 L. Ed. 2d 92 (2006), citing *United States v. Rice,* 327 U.S. 742, 66 S.Ct. 835, 90 L. Ed. 982 (1946). In *Rice*, the Supreme Court ruled that:

> **Congress, by the adoption of these provisions, as thus construed, established the policy of not permitting interrupting of the litigation of the merits of a removed cause by prolonged litigation of questions of jurisdiction of the district court to which the cause is removed. This was accomplished by denying any form of review of an order of remand, and, before final judgment, of an order denying remand.**

327 U.S. at 751.

Petitioner's application for a writ of certiorari attempts just what the statute forbids – "the interruption of litigation of the merits of a removed cause by prolonged litigation of questions of jurisdiction." For this reason, the sanctions award should be upheld, and the writ of certiorari should be denied.

CONCLUSION

The district court not only remanded this matter to state court, but exercised its discretion and awarded Howard all attorney's fees incurred in remanding the suit. The award was affirmed by the Fifth Circuit Court of Appeals, which then awarded attorney's fees and double costs for a frivolous appeal. The award was appropriate because petitioner was unable to cite any legal support for the removal. Instead, petitioner proferred theories for removal that were deemed "farfetched" and a "crazy notion" by the lower court. The sanctions incurred are well-documented and reasonable. The requested writ of certiorari should be denied.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

* *

D. DOUGLAS HOWARD, JR.

V.

LESLEY SIMMONS ST. GERMAIN, HILLARY ROSE SMITH, MELISSA BRANIGHAN, MARK EDW. ANDREWS, ANDREWS ARTS & SCIENCES LAW, LLC, & DAVID E. SIMMONS, DDS

CIVIL DOCKET NO. 09-3450 "J"
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WEDNESDAY, JUNE 24, 2009, 9:30 A.M.

* *

TRANSCRIPT OF PROCEEDINGS
HEARD BEFORE
THE HONORABLE CARL J. BARBIER
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PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY. TRANSCRIPT PRODUCED BY COMPUTER.

[3] **PROCEEDINGS**

WEDNESDAY, JUNE 24, 2009

MORNING SESSION

(COURT CALLED TO ORDER)

THE DEPUTY CLERK: Civil Action #09-3450, *D. Douglas Howard, Jr. versus Leslie Simmons St. Germain, et al.*

THE COURT: Maybe if counsel for the government could just move down a little bit and make a little room for these folks to sit around these tables. Thank you.

All right. Counsel, you can make your appearances, please.

MS. REED: Good morning, Your Honor. Shawn Reed on behalf of D. Douglas Howard, Jr.

MR. HOWARD: D. Douglas Howard, Jr., in *pro se*.

MS. RINARDO: Joanne Rinardo.

MS. YENARI: Amy Yenari.

MR. PETERS: Jonathan Peters.

MR. ANDREWS: Mark Andrews, *pro se* and on behalf of the rest of the defendants.

THE COURT: Who is going to argue on behalf of the movers?

MS. REED: Shawn Reed, Your Honor, myself.

THE COURT: Ms. Reed, okay. Come forward. This is your [4] motion. The only motion that we're hearing this morning is the Plaintiff's, Douglas Howard's, Motion to Remand this matter to state court. I believe I've read everything that you all have filed, and read the cases, or the main cases.

Ms. Reed, you can proceed.

MS. REED: Your Honor, I know that excuse me, good morning. My name is Shawn Reed, and I have the pleasure this morning of representing D. Douglas Howard in this matter.

Judge, I know that you're somewhat familiar with this case. I think you've seen it in the past, and so here we are, again.

Frankly, Judge, this is a case that involves purely state court causes of action. In the *Trevino* case, as this Court is aware, the Supreme Court said that you can avoid federal court by the plaintiff only using – relying on state court causes of action.

Well, as you know, this saga began in First City Court for the collection of a debt. It has escalated to this point now, and it's an ongoing attack on the personal and professional reputation and integrity of Mr. Howard. One would think that this would have ended at some point, but –

THE COURT: What's the status of the underlying – let's see. This started as a suit to collect legal fees –

MS. REED: Open account.

THE COURT: – by Mr. Howard against Ms. St. Germain and [5] somebody else –

MS. REED: That's correct. That's correct.

THE COURT: – for some legal work he did in connection with a divorce, right?

MS. REED: That's correct.

THE COURT: What were the amount of the legal fees involved?

MS. REED: About $4,000.

THE COURT: $4,000. And now we've had two federal lawsuits, two state court suits, RICO suits, defamation suits, appeals to the Fifth Circuit, writs to the U.S. Supreme Court –

MS. REED: Yep.

THE COURT: – over a suit for attorney's fees over three or $4,000.

MS. REED: And I would tell you, Judge, that –

THE COURT: I'll tell both sides here, this is absurd. Both of you, both sides need to grow up here and make this go away. I mean, this is absolutely ridiculous. Okay.

You can proceed from there.

MS. REED: Judge, and I want to – I want to make this clear that I think it was Mr. Howard's intention to make –

THE COURT: Mr. Howard has now collected his fees, right?

MR. HOWARD: Yes.

MS. REED: Yes. But we have paid over $100,000 in fees [6] to defend the suits brought by Mr. Andrews. In addition to that, Your Honor, Mr. Andrews doesn't stop. He's now posted this information on his web site about Mr. Howard. He's

written the bar association on numerous occasions, which cases have been dismissed.

If Mr. Andrews would stop the continuous on-going attacks, then perhaps we could end this matter; but, it's impossible to do that.

So, with that said, Your Honor, the reason I got involved in this case, and I'll tell you, is because I felt like maybe I could interject some levity and calm between the parties. And the very first thing I do is get a motion for sanctions filed against me. I've never met this man before in my life before this morning, and I still haven't formally met him. So I agree with you that this is a very difficult case. But I will tell you –

THE COURT: I didn't say it was a very difficult case.

MS. REED: Well, it's absurd.

THE COURT: You said. I said it's absurd, is what I said. Yes.

MS. REED: But it's on ongoing character assassination that hasn't stopped. If you go to his web site today, you'll find all of this information, that Mr. Howard has basically stolen from clients, his malpractice, his – on and on and on and on.

[7] So, with that said, in an effort to try to stop this, the plaintiffs filed a suit on state court causes of action solely, Your Honor. And these state court

causes of action are defamation, malicious prosecution, abuse of process, intentional and negligent infliction of emotional distress. There were absolutely no federal claims whatsoever urged in this case.

There is no federal question. I think this Court previously dismissed the RICO actions; and, so, from that, the defense now wants to argue that that –

THE COURT: Which was affirmed by the Fifth Circuit, right?

MS. REED: Which was absolutely affirmed by the Fifth Circuit.

THE COURT: Now, Mr. Andrews says he's got a pending writ application to the U.S. Supreme Court?

MS. REED: Yes, sir, but that's really irrelevant to this case, and I'll tell you why. It's because in this very lawsuit, Mr. Andrews filed a reconventional demand, where he realleged all of the same things. So, regardless of what happens with the RICO suit, Mr. Howard still has the same exact state court claims because it didn't just end or begin with the RICO. It's an ongoing. It's everywhere. It's the bar association. It's in the community. It's on his web site.

So, really, what happens with the U.S. writ is not going to change what's ongoing in state court for defamation and [8] malicious prosecution and his ongoing intentional infliction of emotional distress.

Judge, this is a case that, although RICO claims were made, those are just a small minutia of the facts that make up this state court claim. And to say that this Court's dismissal of the RICO action, and the Fifth Circuit approving that, somehow turns a defamation suit into a federal question is also ludicrous, Your Honor. There is no – the very fact that this Court dismissed the RICO case, the Fifth Circuit approved the dismissal, if anything, supports the fact that there is no federal jurisdiction or federal question in this case.

No new – in the original petition, all of the same set of facts were contained in the original petition that was filed in Civil District Court. The supplemental and amending petition filed by Mr. Howard really just recited more specifically the various causes of action. So our first argument is, his whole removal was untimely because –

THE COURT: What defenses, other than trying to remove – removing this case here, removing Mr. Howard's defamation and malicious prosecution, et cetera, state court suit, what defenses, affirmative defenses, has Mr. Andrews or his clients asserted here in this case?

MS. REED: Well, I think that that's a very important question because, under his argument that he is an officer of the court, not only would he have to be an officer of the court, [9] which we say he's not and we'll get into that, the second part of that test by the Supreme Court is that he would have to have a

federal defense in order to maintain jurisdiction under 22 1442 – 28 U.S.C. 1442. The only defenses that he's alleged in this case, *res judicata*, prematurity, and prescription.

THE COURT: *Res judicata* based on –

MS. REED: On the fact that –

THE COURT: – the fact that I did not sanction him, and the Fifth Circuit did not sanction him?

MS. REED: Yes.

THE COURT: Okay.

MS. REED: And so, therefore – but, Your Honor, all of those claims are still state court, state court claims. The prescription would apply state court law of prescription and tolling or peremption. *Res judicata* would also apply in state court, what the state court *res judicata* laws would be. Prematurity are state court prematurity. And this Court would really just be applying state court defenses to a state court claim.

Under 1441 – let's look – that's another thing that he argues. Well, would it have been proper to file this suit in federal court to begin with? And the answer is absolutely not. There is no diversity between the parties. There is no federal claim here. The amount in controversy is over $75,000. The legal fees alone are over $100,000, and that's [10] an actual

damage. So there is no way that this suit could have been filed as original jurisdiction in federal court.

Then, Mr. Andrews attempts to say that, well, he's an officer of the court; and, now, in his reply brief, he says, well, that's novel law. That's not novel law. There is plenty of law to the effect that just because we're licensed to practice before a federal court doesn't make us a federal officer of the law or officer of the court.

There's several cases that we cited, one very similar to this where Mr. Berg successfully defended himself in federal court under a malicious – it was a racketeering case, then filed a malicious prosecution action. The defense tried to remove it to federal court by saying, well, that case arose in federal court, it was about a racketeering charge; and, so, therefore, the malicious prosecution involves a federal question.

The Ninth Circuit sent it back and said, absolutely not. That's a state court issue. It needs to go back to state court. Just by the very fact that you would have to look at some federal issues involved does not change it into a federal question case that would be removable.

Same in the *Cammer* case. A defendant was held by its local bar association – he was in private practice, he was also held on disciplinary charges – that was the *Shimek* case. He came up on disciplinary –

THE COURT: *Cammer* was the case where the lawyer –

[11] MS. REED: In contempt.

THE COURT: – in federal court was held in contempt –

MS. REED: Right.

THE COURT: – under a statute which allows a federal judge to find in contempt an officer of the United States for violation of their official duties.

MS. REED: You're exactly right.

THE COURT: Yes.

MS. REED: And in *Shimek*, this attorney that had – because of what he did in federal court, the state filed disciplinary action against him. He sought to remove his disciplinary proceeding to federal court saying, well, this started in federal court. And they said, no. They sent it back.

The U.S. Supreme Court – citing the U.S. Supreme Court case of *Willingham* that says just because a lawyer is – can practice before the court doesn't make them an officer of the court. An officer of the court – even if – well, let's – even if we assume that he wins on his issue that he is an officer of the court – which clearly he's not under any case that he's cited. In fact, I don't think he ever cited a case that made him an officer of the court. Even if that was the case, the test under 1442 is not only are you an officer of the court, you also have to have a federal defense available to you under 1442.

This is clearly to prevent a state from applying – [12] going off and applying some weird law to a federal officer that, in federal court, would be given immunity of some sort, or they were actually working for the government.

Not only does he not have a defense, and he's not an officer of the court, I can't find anywhere in his pleadings where he's ever even alleged that he has a federal defense in this case. So, therefore, he certainly hasn't met the test under 1442 for federal jurisdiction.

And under 1441, there is nothing that's been done and nothing that could happen in the future, with the U.S. Supreme Court or any other court, that would change this issue into a federal question.

THE COURT: All right. I understand your argument. Let me hear from Mr. Andrews. Thank you.

MS. REED: Thank you, Your Honor.

THE COURT: Mr. Andrews –

MR. ANDREWS: Yes, Your Honor.

THE COURT: – you removed this case, what is ostensibly, on its face, a pure state law claim based on state laws of defamation, malicious prosecution and abuse of process, you removed it to federal court on two grounds, as I see it, right?

MR. ANDREWS: Yes, Your Honor.

THE COURT: One, on behalf of all defendants, that there is a federal question, so it arises under federal law. And, [13] secondly, that as it pertains to you as a named defendant, that you being, quote, an officer of the court, you have a right to remove it under the so-called federal officer removal provision.

MR. ANDREWS: Yes, Your Honor.

THE COURT: Let's talk about the federal officer removal statute first. Do you have a single case which holds or implies in any way that a private lawyer in private practice who practices in federal court is an officer of the United States courts for the purposes of this removal statute or any other statute?

MR. ANDREWS: I do not have a case that holds so. What I have is the *Herron* case from 1994 or '96, in the Fifth Circuit, where, in footnote two, they say, "We do not reach this question."

THE COURT: They say, "We do not reach this question." That's a far cry from holding or even implying that that's the law, right?

MR. ANDREWS: Yes, Your Honor. But I have the First Circuit –

THE COURT: So I'm asking you, again, do you have a single case? And I think you've answered it, but I'm assuming, it sounds like you have no case.

MR. ANDREWS: Your Honor, I have the First Circuit case of *Jones vs. Pinetta*, where a court

reporter was found to be allowed to remove under the statute.

[14] THE COURT: Well, this is a court reporter reporting in federal court. That's a far cry from a private lawyer.

Certainly, if you sued my court reporter in federal court for something – I mean, in state court for something she did here, I would guess she would be a federal officer and able to remove; but, that's a far cry from you being a private lawyer in private practice.

I mean, I just think this is such a farfetched notion that it's ridiculous. And I was hoping that you could come up with one single case to tell me where you came up with this sort of crazy notion that a private lawyer can somehow be a federal officer, an officer of the United States courts, for purposes of the removal statute.

MR. ANDREWS: Your Honor, I have the line of cases that interpret subsection one of the federal officer removal statutes. Most of the cases have been based on the contractor defense, federal contractor defense.

THE COURT: That's the whole purpose of the federal officer removal statute. It's to make sure a federal officer engaged in executing his or her official duties is not subject to, for example, arrest in state court for just, you know, performing their official duties, in state court. And they can't – they're allowed to remove it here so they can assert a federal defense

such as – the common one is immunity, federal officer immunity; or, in the case of a contractor, federal [15] contractor defense.

I mean, this is something I've just – I don't know where you pulled this notion out of the air somewhere, you know. I'm waiting to hear what basis you have for making this allegation.

MR. ANDREWS: Your Honor, under subsection one, and in mostly federal contractor cases, people acting under federal officers –

THE COURT: Which federal officer were you acting under when you did whatever you're alleged to have done in the court? What federal officer was directing you to file the pleadings you filed, or file the RICO suit, or filed any other pleadings that you're – and I'm not making any – understand, I'm not making any prejudgment here on any validity, whether there is any validity at all to Mr. Howard's state court claims against you. But in the federal contractor defense context, the contractor has to show that the contractor was acting pursuant to the directions of a federal officer.

For example, the government comes up with plans as to how to build something, and they tell the – hire a contractor, and this is how we want it built and designed. And the contractor does it in accordance with the government's specifications and directions; then, they are generally entitled to assert the federal contractor defense.

There was no one directing you to do what you did [16] here. You were acting as a private attorney.

MR. ANDREWS: And as an officer of the court, Your Honor. I have no case that says –

THE COURT: So I was directing you to do what you did in this Court, to file what you filed? Are you saying I was the federal officer who was directing you in what you did?

MR. ANDREWS: You didn't direct me to file the case, Your Honor.

THE COURT: Well, name the federal officer who was directing you.

MR. ANDREWS: The entire court was.

THE COURT: The entire court. So the en banc court was directing you to file your pleadings and telling you what to plead and how to plead and what to allege; is that what you're saying?

MR. ANDREWS: No, Your Honor, I'm not saying that –

THE COURT: That's what you just said. You said the entire court was.

Let's move on to something – beyond the fact of not being a federal officer, what is the colorable federal defense that you are alleging in this case?

MR. ANDREWS: Well, the federal defense, which is part of the officer removal, is the claim preclusion, the *res judicata*, the fact that

THE COURT: If you've done any research at all, by now [17] you would have learned that the fact that a state court lawsuit may make claims that could be subject to a *res judicata* defense because of a prior federal court judgment, that is not the basis, that does not give you federal jurisdiction or basis to remove that case.

I've had a number of these cases where people come in, and they will remove a case here from state court because they said it's related to an earlier federal court suit, some judgment or order or ruling that I've rendered. And it may well be related, but that is not proper grounds for removal.

MR. ANDREWS: Yes, Your Honor.

THE COURT: I assume you would have found that out. And there are plenty of jurisprudence for that, the main case being the United States Supreme Court case of *Rivet*, R-I-V-E-T, *versus Regions Bank*, which came out of Louisiana, by the way –

MR. ANDREWS: Yes, Your Honor. I cite that –

THE COURT: – a 1998 case, in which a unanimous Supreme Court held that, "Claim preclusion by reason of a prior federal judgment does not provide a basis for removal jurisdiction."

MR. ANDREWS: Your Honor, that was under 1441.

THE COURT: Did you find that case?

MR. ANDREWS: Yes, sir, I cite it in my brief. And what *Rivet* held was that the claim preclusion was a federal defense; and, therefore, in the *Rivet* case did not create removability [18] under Section 1441.

But my reading of *Rivet*, and I quoted from *Rivet* in my reply brief – I'm sorry, my response brief, and they said that claim preclusion is a defense; and, therefore –

THE COURT: Sure, it's a defense. It can be a defense. It's a defense in state court. But you can raise that in state court, and the state court is fully competent of ruling on that.

Okay, let's move on to another question, because you're not doing too well, here, Mr. Andrews, so far.

What is the federal law that would give this Court federal question jurisdiction?

MR. ANDREWS: 28 U.S.C. Section 1367(d), Your Honor.

THE COURT: All that statute provides is that when I dismissed the federal RICO claim with prejudice, and then I dismissed your state law claims in the original underlying suit without prejudice, you had a right to go back and refile those in state court, if you did it timely.

MR. ANDREWS: Yes, Your Honor.

THE COURT: And whether you did or did not, the state court will have to sort that out; but, that doesn't give you federal jurisdiction here. Those were on – that's on the supplemental jurisdiction claims.

MR. ANDREWS: Your Honor, you did –

THE COURT: So that's your only argument here for federal question is 1367(d)?

[19] MR. ANDREWS: Mr. Howard sued me –

THE COURT: No. Answer my question.

MR. ANDREWS: No, Your Honor. I have a much weaker claim based –

THE COURT: You have a weaker one than that?

MR. ANDREWS: Yes, sir.

THE COURT: Well, let me hear what the weaker one is because –

MR. ANDREWS: The weaker one is based on the civil RICO suit. The stronger one is the 1367(d), which would normally be something to be worked out in state court. It would normally be the plaintiffs/counter-defendants' defense to the counter-claims; but, he amended his complaint, his main action. He amended it to include claims against me for filing the reconventional demand that I was supposed

to have known was time barred. He, therefore, made this federal question of 1367(d) a part of his main action.

THE COURT: Are you suggesting that any time a lawyer does something in federal court and is subsequently sued in state court for legal malpractice, say, or under any state law theory, that that's removable to federal court? Because that's where your argument would lead to. We'd have almost – well, we'd have a whole slew of state law cases removed here just because it involved a lawyer who did something in federal court.

MR. ANDREWS: No, Your Honor, that's not what I'm [20] saying.

THE COURT: That seems to be where your argument would go, you know, would lead to. That would be a logical conclusion.

MR. ANDREWS: The original action for defamation was not removable. I looked. It wasn't removable. It was only when these claims for my bringing the reconventional demand two weeks earlier, only when those claims were amended into the petition that it –

THE COURT: I don't see where anything really changed. It sounds like Mr. Howard just thought of a few other legal bases, but he was alleging the same basic facts. I mean, all of this comes from the original RICO lawsuit and what you did in state court in connection with that –

MR. ANDREWS: Your Honor, he –

THE COURT: – that you accused him of all of these things. And I don't know how that changes anything.

MR. ANDREWS: He could not have sued me for filing the reconventional demands until I filed the reconventional demands two weeks before he sued me on them.

THE COURT: But the reconventional demands just regurgitated what you had already alleged in this Court and in state court. I don't see how that changed anything.

MR. ANDREWS: Because he sued me for bringing them as time barred. That was an element of his suit, because they were time barred. It didn't matter what they said.

[21] THE COURT: If they are, they are; if they are not, they are not. But state court can figure that out as well as I can. I don't see any way that gives us federal jurisdiction here.

Anything else you want to add, Mr. Andrews?

MR. ANDREWS: No, Your Honor. Thank you.

THE COURT: All right. As I said, this case arises out of a suit originally brought by Attorney Douglas Howard in First City Court seeking unpaid legal fees against Ms. St. Germain. And, ultimately, at some point, a default was entered when

Ms. St. Germain did not timely answer that lawsuit in First City Court, and a judgment was entered on behalf of Mr. Howard.

Apparently, after being unable to get that judgment set aside, Mr. Andrews, on behalf of Ms. St. Germain and another client, came to this Court and filed a federal RICO, a racketeering lawsuit, against Mr. Howard alleging that he had engaged in a criminal racketeering enterprise in conjunction with his practice of domestic law.

This Court, ultimately, after hearing argument on the case, on the motions to dismiss – I don't remember now if it was a motion to dismiss or a motion for summary judgment, but I held that the plaintiffs in this Court, in the RICO case, failed to state a viable claim under RICO, and I dismissed all the federal claims in that case with prejudice, and I dismissed the supplemental state law claims without prejudice.

The plaintiffs in that RICO case appealed to the [22] Fifth Circuit. The Fifth Circuit affirmed the dismissal. It is true that both this Court and the Fifth Circuit denied the defendant, Mr. Howard, in that case, the defendant's motion for sanctions. I don't recall exactly what was said about that at the time, frankly, but I think I made a ruling from the bench, as I recall. But I'm not a big fan of sanctioning lawyers, and I'm assuming I just gave Mr. Andrews the benefit of the doubt by not sanctioning him; although, it was certainly plausible that he could have been

sanctioned, I think, for filing that RICO suit, which was totally baseless, as far as I am concerned.

The Fifth Circuit, as I recall, also, in denying the sanctions, made a comment that it was a very close call, which means that could have gone either way.

My understanding is the underlying judgment has been paid; is that right? The legal fees have been paid?

MS. REED: Yes, Your Honor.

THE COURT: It would have been nice if everybody would have just acted as grown-ups at that point and put this thing, this mess behind them; but, for whatever reason, neither side appears capable of doing that.

It's alleged – and I haven't looked at Mr. Andrews' web site, but it's alleged that Mr. Andrews and his clients are continuing on what might be termed a vendetta, a retaliation against Mr. Howard. Mr. Howard, in turn, has filed a state court lawsuit alleging defamation, abuse of process and [23] malicious prosecution. Again, I'm not going to attempt to judge the validity of any of those claims.

And as a result of the filing of that suit, we're here now because Mr. Andrews removed that state court lawsuit here, arguing that there is federal jurisdiction under the so-called federal officer removal statute and/or under the federal question statute, removal statute.

I think neither of those arguments are plausible for the reasons I've largely stated. It's clear to me that there are a number of cases – it is hard to find a case precisely on point like this one, and maybe because this is so farfetched that nobody else has thought of filing something like this; but, in my view, there is no way that a private lawyer, acting in his private capacity in private practice, who handles a case in federal court can be considered an officer of the Courts of the United States for purposes of the removal statute.

And there is plenty of case law that indicates that that is the proper analysis. And you can look at the *Cammer* case from the United States Supreme Court, *Cammer versus United States*, where the Supreme Court held that a lawyer was not an officer of the court within the statute empowering federal court to punish as contempt misbehavior of any of its officers in their official transactions.

The district court case out of Florida, *Florida versus Shimek*, S-H-I-M-E-K, 1973, which held that a lawyer is not [24] an officer for removal statute purposes. There, an officer attempted to remove – apparently, a lawyer, I mean, had done something in federal court which led to state disciplinary proceedings against him. And he argued that he was an officer of the federal court acting in that capacity; therefore, he could remove the state disciplinary action to federal court. The court said, no, that's not correct.

And one case that's pretty close to our case here, closest in terms of factual background, is *Berg versus Leason,* a Ninth Circuit case from 1994, where after successfully defending himself in federal court against allegations of violations of federal security and racketeering laws, the plaintiff, who had been the defendant in the federal court action, plaintiff sued in state court for malicious prosecution. And the defendant removed the case; and, the circuit court – the district court refused to remand it. The Court of Appeals held that malicious prosecution claim did not arise under federal law simply because one element of proof required that the underlying action was legally untenable. And it's awfully close to we have here.

And it's already been decided, in this Court and the Fifth Circuit, that the underlying RICO case was legally untenable. Whether or not that ultimately leads a state court to conclude that it would be considered malicious prosecution or abuse of process or defamation is another matter to be decided in state court.

[25] So Mr. Andrews is not a federal officer. Beyond that, he has not raised a colorable federal defense. And, lastly, there are no federal causes of action or claims pled in the state court lawsuit to make it removable under the federal question jurisdiction. And so, for those reasons, I'm going to grant the motion to remand this case. I'm remanding it for lack of federal subject matter jurisdiction.

Mr. Andrews, I'm going to – was there a request for sanctions in this case or for imposition of fees and costs?

MS. REED: Yes, Your Honor, there was.

THE COURT: I'm going to award Mr. Howard reasonable attorney's fees and costs in conjunction with needing to file the motion to remand and arguing it here today. I'm going to order that a motion for fees, properly supported and documented, be filed within 15 days; that any opposition or traverse to that motion be filed seven days thereafter, and I'll issue my ruling on that.

All right.

MS. REED: Thank you, Your Honor.

MR. HOWARD: Thank you, Your Honor.

THE COURT: Mr. Andrews, before you file any more, you know, you filed a RICO claim in this Court, which was baseless; now, you've filed a removal, which was totally baseless. I am imposing fees and costs this time. This has got to stop. And I strongly suggest that you do a lot more research before you start [26] filing things in federal court, again.

Thank you, Counsel.

MS. REED: Thank you, Your Honor.

(WHEREUPON, at 10:10 a.m., the proceedings were concluded.)

* * *

REPORTER'S CERTIFICATE

I, Cathy Pepper, Certified Realtime Reporter, Registered Merit Reporter, Registered Professional Reporter, Certified Court Reporter, Official Court Reporter for the United States District Court, Eastern District of Louisiana, do hereby certify that the foregoing is a true and correct transcript, to the best of my ability and understanding, from the record of the proceedings in the above-entitled and numbered matter.

s/ Cathy Pepper
Cathy Pepper, CRR, RMR, CCR
Official Court Reporter
United States District Court

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

D. DOUGLAS HOWARD, JR.	CIVIL ACTION
VERSUS	NO: 09-3450
ST. GERMAIN ET AL	SECTION: J(4)

ORDER

(Filed Jul. 20, 2009)

Before the Court is Plaintiff's **Motion for Attorney's Fees (Rec. Doc. 59)**, filed in accordance with the Court's ruling in open-court on June 24, 2009, which granted Plaintiff's motion to remand the above-captioned matter and awarded attorney's fees and costs under 28 U.S.C. § 1447(c) in connection with Defendants' wrongful removal of this case. Plaintiff avers that no costs were incurred in the filing of the motion to remand, and thus he seeks only a reasonable attorney's fee in the present motion. The Defendants' opposition attempts in large part to argue against the validity of the Court's determination that a fee award is warranted in the present circumstances. As the Court has already made its determination as to the propriety of an award under § 1447(c), the Court will not address Defendants' arguments that such an award is improper.

To the extent Defendants oppose the quantum of Plaintiff's requested award, the Court finds that Defendants' arguments are unavailing. Under the provisions of § 1447(c), "[a]]n order remanding [a]

case may require payment of just costs and any actual expenses, including attorney's fees, incurred as a result of the removal." 28 U.S.C. § 1447(c). "[T]he imposition of both costs and attorneys' fees against the removing party may be awarded in the Court's discretion" upon a finding that removal is improper under § 1447(c). *Miranti v. Lee,* 3 F.3d 925, 928 (5th Cir. 1993).

The Fifth Circuit adheres to the "lodestar" method for calculating reasonable attorneys' fees in the context of an award under § 1447(c). *Halliburton Latin America SA v. Intern. Technical Solutions,* 273 F.3d 392, 392 (5th Cir. 2001). This method requires the district court to "determine the reasonable number of hours expended on the litigation and the reasonable hourly rate for the participating lawyers" based on "contemporaneous billing records or other sufficient documentation so that the district court can fulfill its duty to examine the application for noncompensable hours." *La. Power & Light Co. v. Kellstrom,* 50 F.3d 319, 324 (5th Cir. 1995). "A lodestar is calculated by multiplying the number of hours reasonably expended by an appropriate hourly rate in the community for such work." *Heidtman v. County of El Paso,* 171 F.3d 1038, 1043 (5th Cir. 1999). The lodestar is presumed to be the reasonable fee, but it may be adjusted after considerations of the factors listed in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974), overruled on other grounds, *Blanchard v. Bergeron,* 489 U.S. 87

(1989). *Gonzalez v. Associates Health & Welfare Plan*, 2002 WL 31933208, 1 (5th Cir. 2002).

In this case, Plaintiff has requested a fee award in the amount of $7,088.00, which the Court finds to be appropriate in light of the hours reasonably expended and the hourly rate charged in procuring a remand of this matter. The Court notes that the $7,088.00 fee award is especially appropriate in light of the two-year history of vexatious litigation against Plaintiff by the Defendants in this matter, which has already nearly resulted in sanctions against Defendants on two prior occasions. See Civil Action No. 07-9040, Rec. Docs. 33 and 39. Additionally, the Court notes that Defendants' various grounds for removal – while ultimately baseless – were wide-ranging and complicated, and thus required significant effort by counsel for Plaintiff.

Finally, to the extent that Defendant Andrews argues that an award of $7,088.00 against him *individually* would be financially ruinous, the Court notes that it is within the Court's discretion to impose any fee award against all the Defendants, jointly and severally, as parties to the improper removal. See, e.g., *Park Nat. Bank of Houston v. Kaminetzky*, 976 F. Supp. 571, 584 (S.D. Tex. 1996). Thus, Andrews' arguments related to his individual financial situation are irrelevant.

As such, the Court finds that Plaintiff's requested fee award of $7,088.00 is reasonable in the circumstances of this case. Accordingly,

IT IS ORDERED that Plaintiff's **Motion for Attorney's Fees (Rec. Doc. 59)** is hereby **GRANTED**. Plaintiff is hereby awarded $7,088.00 under 28 U.S.C. § 1447(c) as a reasonable attorney's fee for the remand of this matter, to be paid by Defendants Lesley Simmons St. Germain, Hillary Rose Hillyer, Melissa Branighan Luminais, Mark Edward Andrews, Andrews Arts & Sciences Law, LLC, and David E. Simmons, jointly and severally.

New Orleans, Louisiana this 20th day of June, 2009.

/s/ Carl J. Barbier
CARL J. BARBIER
UNITED STATES DISTRICT JUDGE